85-2108

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1985

JOSEPH BIASUCCI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the evidence, viewed in the light most favorable to the government, was sufficient to sustain defendant's RICO conviction, a conviction based upon a charge of unlawful debt collection?

2. Whether defendant's conviction must be reversed, and a new trial ordered, because the trial court erroneously instructed the jury that it could convict defendant even in the absence of proof that he knew the interest rate being charged on money he had provided for lending?

List of the Parties

Apart from the party named in the caption of this petition, the other parties involved in the trial were Vincent Joseph Rotondo, Michael J. Franzese, Benedeto Aloi, Antonio Peter Napoli, Carlo and Ricco Vaccarezza, Leonard Carl DiMaria, Francesco D. Stefano, Jesse David Hyman, Melvin Cooper, Chaim Gerlitz, Oscar Louis Albenga, Allan Albenga, Stanley Gramovot and Anthony Charles Capo, Jr.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Joseph Biasucci, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of conviction entered against the petitioner by the United States District Court for the Southern District of New York (Sand, J.).

Opinions Below

The opinions of the Court of Appeals appear in the appendix hereto at pp. 1a-27a.

Jurisdiction

The date of the judgment of the United States Court of Appeals was March 17, 1986. On April 28, 1986, the Court denied petitioner's petition for rehearing. This Court has jurisdiction under Title 28 U.S.C. § 1254(1).

Statutory Provision Involved in This Case

United States Code, Title 18, Sections 1961(6):

> "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

and 1962(b):

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities which affect, interstate or foreign commerce.

Statement of the Case

Joseph Biasucci's appeal of his conviction for violating various sections of the federal RICO statute, 18 U.S.C. §§ 1961 *et seq.*, requires resolution of a question that is one of first impression in this Court: whether the

unlawful debt collection provision of RICO, *see* 18 U.S.C. § 1961(6),[1] requires, as a prerequisite to conviction, proof that a defendant knew the rate of interest being charged on money he lent. In this case, the issue of knowledge is crucial because the government neither alleged nor proved that Joseph Biasucci lent money directly to anyone. Rather, Biasucci was charged with having invested money with others, who then lent it at usurious rates. While such activity is certainly not laudable and may indeed be a violation of the New York State criminal usury statute, Biasucci contends that this behavior does not amount to a racketeering offense absent proof that he knew what rate of interest was being charged on the money he had invested.

In this case, the evidence, viewed in the light most favorable to the government, showed that Joseph Biasucci invested money in a loansharking operation, and that he believed his actions to be illegal. Yet there was no proof of the element that distinguishes a state usury offense from a RICO violation: that Biasucci knew, as required by 18 U.S.C. § 1961(6), that the interest charged on his money exceeded twice the rate of interest permitted under New York State law. Indeed, the small quantum of evidence presented on this issue, proved just the opposite: that Biasucci was in fact receiving interest at a rate substantially lower than that required for a conviction under the RICO statute. Hence, even though the evidence showed that Biasucci had violated the New York State usury statute, the simple truth here is that the government failed to prove that he had violated federal law.

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[1] As noted, the Statute provides:

> "unlawful debt" means a debt (A) . . . which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with . . . the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate . . . .

A. The Indictment's Allegations and the Jury's Resolution of the Case

The indictment in this case alleged, and the jury concluded, that co-defendants Melvin Cooper and Jessie David Hyman operated a loansharking business in which Joseph Biasucci, among others, invested money. Operating first under the name Cooper Funding, and then as Resource Capital Group, Cooper and Hyman, according to the government's allegations, ran their business as a supposedly "legitimate leasing and finance business." However, according to the government's allegations, they were in fact lending money at usurious rates of interest and using extortionate practices to collect that interest. Among Cooper's and Hyman's supposed victims were Tom Duke, who was attempting to open a country and western nightclub in New York City to be called the "Cowboy Palace"; Walter Fagan and Sylvia Goldstein, who owned a Brooklyn dress shop named "Sylvie's"; and an individual named Peter King.

The indictment alleged that Joseph Biasucci provided Cooper and Hyman with some of the money loaned to these individuals. Specifically, Biasucci was charged with making extortionate extensions of credit to Tom Duke (Count Nine) and the owners of Sylvie's (Count Ten); financing extortionate extensions of credit to Tom Duke (Count Eight), Peter King (Count Fourteen), and the owners of Sylvie's (Count Eighteen); and collection of extensions of credit by extortionate means from Tom Duke (Count Ten). However, *Biasucci was acquitted of all of these charges,* removing the spectre of violence from his case.

Mr. Biasucci was, though, convicted of violating the RICO statute in connection with the loans that were made to Tom Duke. The jury found that, in violation of 18 U.S.C. § 1962(b), Biasucci obtained an interest in the Cowboy Palace, the club Duke was planning to open, through the collection of an unlawful debt (Count Two). This jury finding, in a special verdict, also served as the sole basis for Biasucci's conviction for violating § 1962(c)

(Count One) (participation in an enterprise through collection of an unlawful debt) and § 1962(d) (Count Six) (conspiracy to violate the RICO statute). He was sentenced to a term of seven years imprisonment as a result of this conviction.

B. The Evidence Against Joseph Biasucci

Viewed in the light most favorable to the government, the evidence at trial, most of which was in the form of tapes of an electronic surveillance of Cooper and Hyman's office, supported a jury finding (1) that Biasucci gave Cooper and Hyman $125,000 to lend to others (Government Exhibit 109A at 31); (2) that Biasucci knew that $75,000 of this money had been lent to Tom Duke (*id.*); (3) that Duke had in fact been repaying the money loaned to him by Resource Capital at a usurious rate of interest (T:1503)[2]; (4) that, in return for his money, Biasucci obtained a three percent interest in the Cowboy Palace (Government Exhibit 109A at 31); and (5) that Biasucci believed that Cooper and Hyman's money lending business was illegal. (*See, e.g.*, Government Exhibit 109A at 19, 22)

For all of this evidence, though, proof of one crucial element was missing. Biasucci argued on appeal to the Second Circuit that before one can be convicted of unlawful debt collection, the government must prove beyond a reasonable doubt that (1) money has been loaned at a rate in excess of twice the interest rate allowed under New York State law, which is 25 percent per annum, Penal Law § 190.40,[3] and that (2) the defendant knew that the rate of interest being charged on his money was in excess of 50 percent. On this proof requirement, there was not one iota of evidence showing

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[2] Numbers in parentheses preceded by "T" refer to pages of the trial transcript.

[3] At trial, Duke testified that he was paying a sufficiently high rate of interest. (T:1503)

that Joseph Biasucci knew that Tom Duke was paying interest at a rate in excess of 50 percent per annum. Indeed, to the contrary, the *only* relevant evidence on this issue showed that Biasucci's return on his investment yielded an amount substantially less than that prohibited by the RICO statute. In all the hours and hours of conversations intercepted at the offices of Resource Capital, there was only one discussion of the amount of interest Biasucci was receiving from his investment with Cooper and Hyman. On December 7, 1982, Cooper and Hyman had a discussion in which Hyman states that he has Biasucci's "750," obviously $750 (Government Exhibit 24A at 4), to which Cooper responds: "For last week, or for today?" (*Id.*) Hence, there can be no doubt that Biasucci's weekly return on his investment of $125,000 was $750.[4] Assuming, as Biasucci must for the purposes of this petition, that the $750 each week was only interest, and not repayment of principal, on his investment, the proof nonetheless shows that Biasucci received only a 31 percent annual return on his money. This is a figure far below the rate needed to sustain a conviction in this case. Further supporting Biasucci's position here is another December 7, 1982, conversation between Biasucci and Hyman in which Biasucci makes clear that he considers a 14 or 15 percent rate of interest to be "a nice return" on his money. (Government Exhibit 22A at 5) Obviously, as a matter of common sense, a person who invests money with expectations of earning interest at a rate in excess of 50 percent per year would not consider a 14 or 15 percent annual interest rate to be a "nice return."

Hence, resolution of Biasucci's appeal to the Second Circuit depended on the answer to a single question, one of first impression both in that Court and here. If, as Biasucci contended, a conviction for unlawful debt

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[4] In summation, the government attorney agreed that Biasucci "got $750 a week." (T:8748) However, he argued that this was payment only for the $75,000 invested in the Cowboy Palace. Despite this claim, there was no evidence presented to support that theory.

collection under the RICO statute requires proof that a defendant knew the rate of interest being charged on money that he loaned, Biasucci's conviction should have been reversed and the indictment should have been dismissed.

The Court of Appeals, however, rejected this argument by concluding that (1) the RICO statute does not require proof of a specific intent to violate the statute and (2) since a principal does not have to have knowledge of the rate of interest being charged, the government need not prove that an aider and abettor has such knowledge. Petitioner contends that the Court's analysis of this issue was erroneous.

REASONS FOR GRANTING THE WRIT

I

The Evidence, Viewed in the Light Most Favorable to the Government, Was Insufficient to Sustain Defendant's Conviction.

As the trial court correctly instructed the jury, the unlawful debt collection provision of RICO requires proof beyond a reasonable doubt:

> First, that a debt existed.
>
> Second, that the debt was unenforceable, in whole or in part, because of usury laws.
>
> Third, that the debt was incurred in connection with the business of lending money at a rate at least twice the legally enforceable rate.
>
> Fourth, that the defendant collected or aided and abetted in the collection of some part of the debt.
>
> Fifth, that the defendant acted knowingly, willfully, and unlawfully.

(T:9735-9736) At issue in this case is the meaning of the term, "knowingly." This is a question of first impression, on which RICO legislative history provides no guidance. In the government's, the trial court's, and the Court of Appeals' view, a conviction for unlawful debt collection can be supported merely by proof that "without knowing the precise rates that were charged, [the defendant] was aware of the generally unlawful nature of the particular loan in question and also that it was the practice of the lenders to make such loans." (T:9739) Petitioner, to the contrary, maintains that the "knowledge" element of the crime requires proof that a defendant knew the rate of interest actually being charged on the money he lent. Were this not the case, a serious anomaly in the law would arise, permitting the conviction of investors such as Biasucci even if they took affirmative steps to avoid violating the RICO statute.

In considering this issue, it is important to emphasize that no activity can be deemed racketeering per se. Rather, one becomes a "racketeer" only when his criminal activity rises to a particularly serious level. Hence, a person who commits a murder or robs someone in violation of state law does not become a racketeer by virtue of that single act. Rather, in addition to RICO's other required elements, he must have committed more than one crime, thereby transforming his criminal behavior into a pattern of racketeering activity. Similarly, a loanshark, *i.e.*, one who violates the New York State criminal usury statute, Penal Law § 190.40, is not necessarily a racketeer. Rather, under 18 U.S.C. § 1961(6), the loanshark becomes a racketeer only if he is in the "business of lending money . . . at a rate usurious under state or federal law, where the usurious rate is at least twice the enforceable rate. . . ."[5] This distinction is not an

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[5] Alternatively, a loanshark becomes a racketeer if his lending of money involves extortionate practices in violation of 18 U.S.C. §§ 891-894. *See* 18 U.S.C. § 1961(1)(B). In this case, though, the jury acquitted Biasucci on all charges under those statutes and, in a special verdict, rejected their use as predicate racketeering acts.

insignificant one, as a RICO conviction carries with it a possible penalty of 20 years imprisonment and substantial forfeiture, while a conviction under New York Penal Law § 190.40 calls for a maximum term of imprisonment of only four years. *See* New York Penal Law § 70.00.

It is precisely because a loanshark is not necessarily a racketeer that knowledge of the rate of interest being charged on money loaned must be deemed to be an essential element of the offense. For it is the element of knowledge that distinguishes the State usury law violator from the RICO offender. Indeed, were the government's view of the law accepted, a person such as Biasucci could be convicted for unlawful debt collection even if he took affirmative steps to ensure that he was not violating the RICO statute. Suppose, for example, that Biasucci, aware of RICO's increased penalties, had given money to Cooper and Hyman with the express proviso that they not violate RICO by lending money at an interest rate in excess of 50 percent per year. Suppose further that Cooper and Hyman assured Biasucci that they would accede to his wishes, and obtain a lower rate of return on his money, but then proceeded to violate the agreement by lending money to Tom Duke at a rate in excess of 50 percent per year. If, as the trial court charged the jury, "it is also enough if, without knowing the precise rates that were charged, [Biasucci] was aware of the generally unlawful nature of the particular loan in question and also that it was the practice of the lenders to make such loans," (T:9739), these facts would support a RICO conviction for Biasucci even though he specifically intended *not* to violate the statute. That is, Biasucci would have known (1) that Cooper and Hyman were in the business of lending money at usurious rates and (2) that his money had been loaned at rates which were unlawful under Penal Law § 190.40. Surely, the possibility of such an anomalous result conclusively demonstrates defendant's point here. Unless the government is required to prove beyond a reasonable doubt that a defendant charged with unlawful debt collection knew the rate of

interest that was being charged, convictions will result even in the face of a clear intent not to violate the law.

Liparota v. United States, ____ U.S. ____, 105 S.Ct. 2084 (1985), provides strong support for defendant's position here. In *Liparota*, this Court considered whether a conviction under 7 U.S.C. § 2024(b), which provides sanctions for "whoever knowingly uses, transfers, acquires, alters, or possesses [food stamps] in any manner not authorized by [federal law]," requires proof that a defendant knew that his acquisition or possession of food stamps was not authorized by statute or regulations. The Court there rejected the government's claim that the knowing acquisition of the food stamps, coupled with the mere fact that the manner of acquisition or possession was unauthorized, was sufficient to sustain a conviction under the statute. To the contrary, the Court concluded that the government was also obligated to prove that the defendant knew he was acting in an unauthorized manner. In so holding, the Court focused upon two factors which are also present here. First, it noted that the legislative history of 7 U.S.C. § 2024(b) offered no guidance on the issue of the statute's *mens rea* requirement. Accordingly, it relied upon its "longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" 105 S.Ct. at 2089 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). The same reliance is appropriate here. As in *Liparota*, RICO's legislative history sheds no light on the question of the requisite knowledge needed for an unlawful debt collection conviction. Accordingly, as in *Liparota*, the rule of lenity should apply and Biasucci's view of the law should prevail.

The second consideration relied upon by the Court was the fact that the government's less stringent view of the statute's knowledge requirement resulted in the criminalization of "apparently innocent conduct." 105 S.Ct. at 2088. Noting that the food stamp statute, if read literally, seems to permit the use of food stamps only "to purchase food in retail food stores which have been

approved for participation in the food stamp program at prices prevailing in such stores," 7 U.S.C. § 2016(b), the Court stated:

> A strict reading of the statute with no knowledge of illegality requirement would thus render criminal a food stamp recipient who, for example, used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants. Such a reading would also render criminal a nonrecipient of food stamps who "possessed" stamps because he was mistakenly sent them through the mail due to administrative error, "altered" them by tearing them up, and "transferred" them by throwing them away.

105 S.Ct. at 2089 (Footnote omitted). In essence, then, the Court found that the possibility of such unfair results required that the statute's knowledge requirement be read more broadly than suggested by the government.

The reasoning of *Liparota* is even more compelling here. For, unlike *Liparota,* where the government's narrow reading of the statute's knowledge requirement would have permitted the prosecution of inadvertent actions, the Court of Appeals' view of RICO's unlawful debt collection provision would permit conviction of one who specifically sought *not* to violate the statute. The fact that one could be convicted despite explicit instructions that his money be lent at an interest rate of less than 50 percent conclusively demonstrates that the statute's *mens rea* requirement must be more substantial.

In the Court below, the government argued that *Liparota*'s reasoning on this score is distinguishable because, in contrast to *Liparota,* where the Court was concerned with the possibility that wholly innocent people might be prosecuted, its view of the RICO statute still requires intentional criminal activity by a defendant. That is, the government maintained that, even

under the trial court's instructions, a jury was required to find that Biasucci "was aware of the generally unlawful nature of the particular loan in question." (T:9739) This argument is wholly specious, suggesting that so long as a person has the requisite intent to commit *some* crime, he may be prosecuted for *any* crime. Given both the possibilities of 20 years imprisonment and the substantial forfeitures provided for by the RICO statute, it is not at all unlikely that an individual might be willing to risk the four-year maximum term of imprisonment provided for by the New York State usury statute, *see* Penal Law §§ 70.00 and 190.40, but nonetheless take definite steps to ensure that he would not become a RICO violator. Indeed, this deterrent effect is one of RICO's prime goals. *See United States v. Turkette*, 452 U.S. 576, 588-89 (1981).

To be sure, one who curtails the gravity of his criminal activity in order to limit his exposure to criminal liability deserves our moral condemnation and should be prosecuted under the applicable statute. By the same token, though, if he affirmatively endeavors, for whatever reason, to avoid violating a more drastic federal statute, he should not be prosecuted under that statute simply because his actions are morally reprehensible. As one commentator has noted: "If the criminal law is extended to punish bad intent alone . . . , it goes beyond its accepted role, appears unfair and overreaching, and ultimately loses its credibility and integrity." Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L.Rev. 266 (1975); *see Commonwealth v. Kennedy*, 170 Mass. 18, 20, 48 N.E. 770, 777 (1897) (Holmes, J.) ("[T]he aim of the law is not to punish sins . . . ."); Hughes, *One Further Footnote On Attempting The Impossible*, 42 N.Y.U. L.Rev. 1005, 1008 (1967) ("[T]he law can only concern itself with intents that go to objectives which as a matter of fact have been declared to be criminal objectives by the law of the land.") Should the government's and the Court of Appeals' view of the intent and knowledge elements of the crime of unlawful debt collection prevail, prosecutions

for bad intentions, rather than criminal activity, will inevitably, and unfortunately, result.

Moreover, a relaxed scienter requirement would result in disparate treatment of defendants, such as Biasucci, who aid and abet those who extend usurious loans, as opposed to those who actually extend an illegal loan. The person who directly lends the money cannot avoid knowing the rate of interest being charged. In extending the loan, he asks that he receive a certain amount of money each week as interest. Hence, one who lends money at a rate in excess of 50 percent per annum necessarily *knows* that he is lending money at this rate of interest. In contrast, if the scienter requirement urged by defendant is not read into the statute, an aider and abettor such as Biasucci could be convicted without the knowledge that the actual lender of the money must necessarily have. Hence, failure to adopt the *mens rea* requirement urged by Biasucci would run afoul of the basic legal principle that "criminal intent must exist in the minds of both the principal and the aider and abettor." *United States v. Delamotte,* 434 F.2d 289, 293 (2d Cir. 1970), *cert. denied,* 401 U.S. 921 (1971); *see United States v. Peoni,* 100 F.2d 401, 402 (2d Cir. 1938); *United States v. Crow Dog,* 399 F.Supp. 228, 241 (N.D. Iowa 1975), *aff'd,* 532 F.2d 1182 (8th Cir.), *cert. denied,* 430 U.S. 929 (1976).

There is strong support for defendant's position in analogous decisions which hold that one cannot be convicted as an aider and abettor of an armed robbery, in violation of 18 U.S.C. § 2113(a) and (d), unless there is proof that the aider and abettor knew that a weapon would be used during the robbery. *See United States v. Sanborn,* 563 F.2d 488, 491 (1st Cir. 1977); *United States v. Short,* 493 F.2d 1170, 1172 (9th Cir. 1974); *United States v. Longoria,* 569 F.2d 422, 425 (5th Cir. 1978). Particularly relevant in this regard is *United States v. Sanborn, supra,* where the Court stated:

> An aider and abettor need not know every last detail of the substantive offense . . . , but he must share in the principal's essential criminal intent . . . . *While the § 2113(d) offense does not, in so many words, require the principal to be aware that he is using a dangerous weapon, his own knowledge is manifest from the fact of use, and in seeking to convict an aider and abettor of the aggravated offense, we think the Government must show the accomplice knew a dangerous weapon* [*would be used*] or at least that he was on notice of the likelihood of its use.

563 F.2d at 491 (Emphasis supplied); *accord, United States v. Short, supra.* Hence, in another setting, the courts have recognized that where a principal must necessarily have knowledge of a particular fact in committing a crime, the government must, as a result, prove that an aider and abettor had the same knowledge.

Finally, it is important to emphasize that defendant is not maintaining that the government must prove that a defendant had a specific intent to violate RICO's unlawful debt collection provisions. Rather, the issue here is knowledge, not intent. While the government need not prove that one intended to violate the RICO statute or, for that matter, that he knew he was violating the RICO statute, the government must nonetheless prove that a defendant who is charged as an aider and abettor knew what interest rate was being charged on the money he had provided for loans. As Second Circuit's own opinion states, "RICO requires . . . proof that a debt . . . was unenforceable under New York's usury laws." (18a)

The simple fact here is that New York's usury laws require proof that a lender knew the rate of interest being charged. *See People v. Pelose, Jr.,* 116 Misc.2d 788, 456 N.Y.S.2d 619 (2d Cir. Westchester Co. 1982); *accord, French American Banking Corporation v. Dulong Importers, Inc.,* 63 A.D.2d 632, 405 N.Y.S.2d 251, 252 (1st Dept. 1978). Indeed, Penal Law § 190.40, the State

criminal usury statute, explicitly states that one must "*knowingly* charge, take or receive" an excessive rate of interest. (Emphasis supplied.) Under Penal Law § 15.05(2), "a person acts knowingly . . . when he is *aware* that his conduct is of such a nature that such circumstances exist . . . ." (Emphasis supplied.) It is not surprising, therefore, that New York's Pattern Criminal Jury Instructions provide, *inter alia*, that "a person knowingly charges . . . interest at a rate in excess of twenty-five percentum per annum . . . when he is *aware* that he is charging . . . interest at such rate." 2 C.J.I. (N.Y.) Penal Law § 190.40, at 1311 (Emphasis supplied).

Hence, by the very terms of the Court's opinion, the RICO statute requires proof that a defendant knew what rate of interest was being charged. To hold otherwise would permit the conviction and punishment of those who take affirmative steps to avoid violating federal law. Accordingly, petitioner's conviction must be reversed and the indictment dismissed. As demonstrated *supra*, at 5-6, there was simply no evidence presented at trial upon which a rational juror could have concluded beyond a reasonable doubt that Joseph Biasucci knew that Cooper and Hyman were charging Tom Duke an interest rate in excess of 50 percent a year.[6]

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[6] Of course, the government's burden of proof on the RICO conspiracy charge is somewhat different because one can be found guilty of this crime even if no loan was ever extended. However, knowledge of the interest rate is nonetheless an essential element of a RICO conspiracy. Obviously, if the rate of interest is what distinguishes a state usury law violator from a racketeer, one cannot agree to violate RICO unless one agrees that an interest rate in excess of 50 percent will be charged. In any event, Biasucci was sentenced to a term of imprisonment only for his substantive § 1962(c) RICO violation (Count One).

II

Alternatively, At a Minimum, Petitioner's Conviction Must Be Reversed Because the Trial Court Instructed the Jury That It Could Convict Defendant Even in the Absence of Proof That He Knew the Interest Rate Being Charged by Cooper and Hyman.

Assuming *arguendo* that this Court concludes that there was sufficient evidence upon which the jury could have concluded that Biasucci knew that Tom Duke was being charged interest at a rate in excess of 50 percent a year, petitioner's conviction must nonetheless be reversed because the trial court erroneously instructed the jury on the issue of knowledge. In defining the critical term, "willfully," the trial court explained:

> It means to act with the intent of participating, either as a principal or as an aider and abettor, in the collection of a debt which has an interest rate in excess of that allowed by law, and which is part of a regular practice of lending money at rates that are at least twice the legally enforceable rate.
>
> This does not mean, however, that the defendant must be aware of the maximum permissible interest rate. It is enough if: 1) he knew the rate that was being charged on the loan and that such rates were customarily charged by the lenders in question, and 2) those rates were, in fact, in excess of the legally enforceable rate and usually at least twice the legally enforceable rate. *It is also enough if, without knowing the precise rates that were charged, he was aware of the generally unlawful nature of the particular loan in question and also that it was the practice of the lenders to make such loans.*

(T:9738-39) (Emphasis supplied).

Counsel objected to this charge, stating:

> If the lawful rate [for example] is 24 percent, the defendant has to know that loans were being regularly made in excess of 48 percent . . . .
>
> * * *
>
> Let me post a hypothetical:
>
> If all a particular defendant knew was that a particular loan was being collected and that loan bore an interest rate to his knowledge of 26 percent, my contention is that the debt would be unlawful, that the debt would be usurious whether he was or was not aware of the maximum rate of 24 percent; but that before he could be convicted of racketeering, he has to know more than that. He has to know that the loan was being made as part of a business that regularly loaned money at rates that happened to be in excess of twice what the laws allows --not that he has to know that it is twice what the law allows.

(T:8105; *see* T:8130-31)

For the reasons urged in POINT I, *supra,* at 7-15, the trial court's instruction was erroneous, permitting the jury to convict Biasucci even if they concluded that he was unaware of the interest rate that Tom Duke was being charged. Moreover, the error cannot be deemed harmless, as defendant's sufficiency of the evidence argument makes clear that the government's proof on the question of knowledge was, at best, very weak. Hence, at a minimum, defendant's conviction should be reversed and a new trial ordered.

III

Petitioner Joins in All Arguments of His Co-Defendants Insofar As They Are Applicable to Him and Not Inconsistent With the Arguments Raised Herein.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: June 18, 1986

APPENDICES

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 459, 460, 461, 462, 463, 464, 471, 509

August Term, 1985

(Argued November 25, 1985 Decided March 17, 1986)

Docket Nos. 85-1206, 85-1207, 85-1208, 85-1209, 85-1210, 85-1211, 85-1212, 85-1224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

JOSEPH BIASUCCI, JESSE DAVID HYMAN, a/k/a "DOC," STANLEY GRAMOVOT, ALAN ALBENGA, MELVIN COOPER, ANTHONY CHARLES CAPO, JR., OSCAR LOUIS ALBENGA, a/k/a "AL"and CHAIM GERLITZ,
Defendants-Appellants.

Before:

TIMBERS, PIERCE and MINER,
Circuit Judges.

Appendix A
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Appeal from judgments of the United States District Court for the Southern District of New York entered after a jury trial before Judge Leonard B. Sand, in which appellants were convicted of various RICO Act violations, 18 U.S.C. §§ 1961-1968, and of extortionate credit transactions, 18 U.S.C. §§ 891-896. Claims of unlawful video surveillance, improper *mens rea* instructions, double jeopardy and prosecutorial misconduct are rejected and the convictions are affirmed.

GERALD L. SHARGEL, New York, N.Y., *for Defendant-Appellant Biasucci.*

MICHAEL YOUNG, New York, N.Y. (David Breitbart, New York, N.Y. of counsel), *for Defendant-Appellant Hyman.*

SUSAN G. KELLMAN, New York, N.Y., *for Defendant-Appellant Gravovot.*

Ralph Naden, New York, N.Y., for *Defendant-Appellant Alan Albenga.*

THOMAS PUCCIO, New York, N.Y. (Strook & Strook & Lavan, New York, N.Y., of counsel), *for Defendant-Appellant Cooper.*

JOEL M. STEIN, New York, N.Y., *for Defendant-Appellant Capo.*

ROBERT BLOSSNER, New York, N.Y., *for Defendant-Appellant Oscar Albenga.*

JULIA P. HEIT, New York, N.Y., *for Defendant-Appellant Gerlitz.*

Appendix A
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JOHN F. SAVARESE, Asst. U.S. Atty., New York, N.Y. (Rudolph W. Giuliani, U.S. Atty., Bruce A. Baird, Aaron R. Marcu, Warren Neil Eggleston, Asst. U.S. Attys., New York, N.Y., of counsel), *for Plaintiff-Appellee.*

MINER, *Circuit Judge:*

Eight defendants appeal from judgments of conviction entered following a jury trial in the United States District Court for the Southern District of New York (Sand, J.) stemming from their involvement in a loansharking operation. Their principal contentions on this appeal are that certan videotapes recorded by a camera surreptitiously installed in a private business office should have been suppressed, that misconduct on the part of the prosecutor deprived them of a fair trial, that the trial court erroneously charged the jury on the state of mind the government must prove to establish the "collection of unlawful debt," and that imposition of consecutive sentences for convictions under two statutes violated the double jeopardy clause of the Fifth Amendment. Finding that none of these or any of appellants' other arguments warrant reversal, we affirm the convictions in all respects.

I. BACKGROUND

Appellants Joseph Biasucci, Jesse David Hyman, Melvin Cooper, Oscar Louis Albenga, Alan Albenga, Stanley Gramovot, Anthony Capo, Chaim Gerlitz, and seven others were indicted for a variety of Racketeer

Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982) ("RICO"), and extortion, 18 U.S.C. §§ 891-896 (1982), offenses.[1]

The charges against appellants stemmed from ten loans totaling approximately two-million dollars made by Resource Capital Group ("Resource Capital") in 1981 and 1982. Hyman and Cooper, who directed Resource Capital, were the central figures in these transactions. They conducted the scheme by drawing in customers with credit problems through promises of legitimate financing. They then would tell their customers that those funds were unavailable, but that the customers could get "emergency funds" at interest rates of one and one-half to five percent per week. As part of the effort to conceal the true nature of these transactions, the customers were obliged to sign documents falsifying the actual interest rates. Customers also were required to provide mortgages on their property, or shares in their businesses, as security for the loans. Interest payments were due weekly, and when the borrowers had difficulty

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[1] Indictment S 84 Cr. 479, consisting of 23 counts, was filed on December 20, 1984. Count One charged all 15 defendants with conducting and participating in the affairs of an enterprise through a pattern of racketeering activity consisting of extortionate extensions of credit, financing extortionate extensions of credit, and extortionate collections of credit, as well as through the collection of unlawful debt, in violation of 18 U.S.C. § 1962(c). Counts Two through Five charged varying groups of the appealing defendants with acquiring interests in and control over four businesses through the collection of unlawful debt in violation of 18 U.S.C. § 1962(b). Count Six charged all eight appellants with conspiracy to violate 18 U.S.C. §§ 1962(b), (c), in violation of 18 U.S.C. § 1962(d). Counts Seven through Twenty-Three charged various groups of defendants with a number of extortionate extensions of credit, financing extortionate extensions of credit, and extortionate collections of credit, in violation of 18 U.S.C. §§ 892-894, all of which were predicate offenses in the pattern of racketeering activity charged in Count One.

meeting the payments, they were threatened with loss of their property, loss of control of their businesses, or physical injury.

The other appellants were involved with the loansharking operation in various ways. Biasucci and Gerlitz made funds available to Hyman and Cooper to operate the loansharking business and shared in the illicit profits collected from the business's customers. Gramovot brought one of the enterprise's victims to Resource Capital and later shared in the effort to take control of her business. Oscar Albenga was the chief collector of money from victims and Alan Albenga worked under his direction. Capo physically assaulted one of the enterprise's victims and, together with several other defendants, attempted to force that victim to sign over his interest in his business to the defendants.

At trial, the government established the existence of this racketeering enterprise and its loansharking activities principally through the testimony of victims of the loansharks, over 100 tape-recorded conversations from the Resource Capital offices and other locations, several videotapes recorded by a camera that had been surreptitiously installed in the Resource Capital offices, and various records and documents seized from the Resource Capital offices. After a thirteen-week trial and five days of deliberation, the jury returned guilty verdicts against the eight appealing defendants on various counts of the indictment and acquitted seven other defendants on all counts.[2]

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[2] All appealing defendants, except Capo, were convicted of violating 18 U.S.C. § 1962(c) (Count One). Hyman and Cooper were convicted of violating 18 U.S.C. § 1962(b) by acquiring interests in four businesses (Counts Two through Five). Gerlitz was convicted of violating § 1962(b) by acquiring interests in three businesses (Counts Two through Four). In addition, Biasucci was convicted on Count

(footnote continued on following page)

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This appeal presents essentially four issues. First, appellants argue that the visual electronic surveillance of the Resource Capital offices, conducted pursuant to a court order, was improper because no statutory authority provided for such surveillance, and that even if authority did exist, the government failed to demonstrate a valid basis for such surveillance. Second, they contend that the RICO statute, 18 U.S.C. §§ 1962(b) and (c), required that the government establish that each defendant had specific knowledge of the actual rate of interest charged on a usurious loan and that Judge Sand's failure to so instruct the jury was error. Third, appellants argue that they were deprived of a fair trial by certain acts of prosecutorial misconduct. Finally, Hyman and Cooper claim that the same conduct formed the basis for their convictions under both section 1962(b) and section 1962(c) and that consecutive sentences on these convictions, therefore, violated the double jeopardy clause of the Fifth Amendment. Finding these arguments, as well as all others presented by the appellants, to be without merit, we affirm the convictions.

(footnote continued from previous page)
Two; Oscar and Alan Albenga were convicted on Count Three; and Gramovot was convicted on Count Four. All eight appellants were convicted of violating 18 U.S.C. § 1962(d) by conspiring to participate in the affairs of a racketeering enterprise (Count Six). Oscar Albenga was convicted of an extortionate collection of credit (Count Eight); Hyman and Cooper were convicted of an extortionate collection of credit (Count Sixteen); and Alan Albenga was convicted of an extortionate collection of credit (Count Twenty-Two). Counts Seven and Twenty were dismissed at the end of the government's case. All defendants were acquitted on the remaining counts submitted to the jury.

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II. DISCUSSION

A. *Visual Electronic Surveillance*

On November 30, 1982, District Judge Thomas C. Platt issued an order pursuant to Fed. R. Crim. P. 41 and 57(b) authorizing Federal Bureau of Investigation ("FBI") agents to enter the Resource Capital offices and install a hidden video camera, which would record the movements of all persons who entered the premises over a thirty-day period.[3] Prior to trial, the defendants unsuccessfully moved to suppress the fruits of this surveillance, and the government thereafter offered into evidence ten of the videotapes. Appellants Hyman, Cooper, and Gerlitz argue that this surveillance was improper because no statutory authority provided for video surveillance in domestic criminal investigations, and even if authority did exist, the government failed to demonstrate a valid basis for such surveillance.

Appellants correctly note that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1982), which authorizes federal judges to issue warrants (orders) for domestic wiretapping and electronic eavesdropping, does not authorize federal courts to permit visual electronic surveillance of private premises. *United States v. Torres,* 751 F.2d 875, 880 (7th Cir. 1984), *cert. denied,* 105 S. Ct. 1853 (1985); *United States v. Ianniello,* 621 F. Supp. 1455, 1467 (S.D.N.Y. 1985); *In re Order Authorizing Interception of Oral Communications and Videotape Surveillance,* 513 F. Supp. 421, 422-23 (D. Mass. 1980); *People v. Teicher,* 52 N.Y.2d 638, 652-53, 439 N.Y.S.2d 846, 853, 422 N.E.2d 506, 513 (1981); *Sponick v. City of Detroit Police*

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[3] The order was extended on January 12, 1983 for an additional 30-day period. The government also installed a microphone in the Resource Capital offices to record sound. None of the appellants contests the validity of that aural surveillance.

Department, 49 Mich. App. 162, 198, 211 N.W.2d 674, 690 (Mich. Ct. App. 1973). The statute sanctions only the "interception of wire or oral communications." 18 U.S.C. §§ 2516(1), 2518(1) (1982); *cf. United States v. New York Telephone Co.*, 434 U.S. 159, 166 (1977) (pen registers are not governed by Title III because they are not concerned with "the *aural* acquisition of the *contents* of any wire or oral *communication*" (emphasis in original)).

Nor does the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811 (1982) ("FISA"), which is broad enough to embrace visual electronic surveillance, *id.* § 1801(f), authorize such surveillance in domestic criminal investigations. The FISA allows the government to use electronic surveillance only for the purpose of obtaining "foreign intelligence information." *Id.* § 1804(a)(7)(B); *see United States v. Duggan*, 743 F.2d 59, 77-78 (2d Cir. 1984) (FISA warrant properly limited to foreign intelligence purposes); S. Rep. No. 604, 95th Cong., 2d Sess. 5, 7-10 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 3904, 3906, 3908-11.

On the other hand, nothing in Title III or the FISA indicates that Congress intended to prohibit video surveillance in domestic criminal investigations.[4] Thus, all

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[4] Appellants argue that there is such an indication in the FISA and its legislative history. As part of that Act, Congress amended Title III, stating "the procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted." 18 U.S.C. § 2511(2)(f); *see also* S. Rep. No. 604, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3916-17 ("S. 1566 would alter the current debate arising out of the uncertainty of the present law by completing an exclusive charter for the conduct of electronic surveillance in the United States."). Citing this amendment, appellants contend that Title III and the FISA are the exclusive sources of authority for electronic surveillance. This same argument was presented to the Seventh Circuit, which responded: "All this section means . . . is that the [FISA] is intended

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that can be said is that Congress has not yet enacted any legislation explicitly authorizing domestic electronic video surveillance. Prior to the 1968 enactment of Title III, there similarly was no specific statutory authorization for wiretapping or electronic eavesdropping. Nevertheless, the Supreme Court had approved the court-ordered use of a concealed electronic device to record conversations, holding that the government had satisfied Fourth Amendment requirements. *Osborn v. United States,* 385 U.S. 323, 328-31 (1966); *cf. Katz v. United States,* 389 U.S. 347, 354-59 (1967) (wiretapping of telephone booth held unconstitutional because FBI agents did not obtain prior judicial approval); *Berger v. New York,* 388 U.S. 41, 58-59 (1967) (New York wiretapping statute held unconstitutional because it did not adequately incorporate constitutional standards); *Silverman v. United States,* 365 U.S. 505, 513 (1961) (Douglas, J., concurring) (noting that because agents had failed to secure a search warrant as "required by the Fourth Amendment and Rule 41 of the Federal Rules of Criminal Procedure," the electronic surveillance was illegal).

(footnote continued from previous page)
to be exclusive in its domain and Title III in its." *Torres,* 751 F.2d at 881. Furthermore, the Senate Report that accompanied the bill which eventually was enacted as the FISA referred to § 2511(2)(f) as strictly a technical and conforming amendment. S. Rep. No. 604, 95th Cong., 2d Sess. 3, 63-64, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3904, 3904, 3964-65. If § 2511(2)(f) was intended to restrict any power of government, its focus was on the President's implicit power to use television surveillance for the protection of national security. We agree with the Seventh Circuit that this amendment should not be read as a prohibition of video surveillance in domestic criminal investigation.

In more recent times, the Supreme Court has held that Fed. R. Crim. P. 41[5] authorizes the issuance of a warrant permitting the use of a pen register. *New York Telephone,* 434 U.S. at 168-70 (citing *Katz* and *Osborn*). The Court further has noted that Fed. R. Crim. P. 57(b)[6] reinforces its "conclusion that Rule 41 is sufficiently broad to include seizures of intangible items . . . ." 434 U.S. at 170.[7]

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[5] Rule 41 provides in pertinent part:

> Property or persons which may be seized with a warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

"Rule 41 is not limited to tangible items but is sufficiently flexible to include within its scope electronic intrusions authorized upon a finding of probable cause." 434 U.S. at 169.

[6] Rule 57(b) provides in pertinent part that "[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." Thus, irrespective of Rule 41, federal district courts have an inherent power to issue warrants authorizing domestic video surveillance. *Torres,* 751 F.2d at 878-79.

[7] Gerlitz argues that the Supreme Court's discussion in *New York Telephone* concerning the scope of Rule 41 is mere orbiter dicta because the Court subsequently held that individuals have no legitimate expectation of privacy in the information seized by pen registers. *See Smith v. Maryland,* 442 U.S. 735 (1979). In our view, *New York Telephone* still retains precedential value in regard to the scope of Rules 41 and 57. *Smith* only decided that, since a pen register invaded no privacy interests of the defendant, a search warrant was not required. *Smith* did not consider the scope of Rules 41 and 57. Moreover, at the time *New York Telephone* was decided, the Supreme Court clearly assumed for the purpose of that case that the Fourth Amendment did apply to pen registers and that a Rule 41 warrant was necessary. Finally, *New York Telephone* is sound in its reasoning and drew upon abundant historical and judicial support for its conclusion.

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Relying primarily on *New York Telephone,* the Seventh Circuit has held that a district court, pursuant to Rule 41, may issue an order authorizing television surveillance of the interior of an apartment allegedly being used by a terrorist organization as a "safe house" to assemble bombs. *Torres,* 751 F.2d at 883; *accord Ianniello,* 621 F. Supp. at 1467. Finding the reasoning in *Torres* to be compelling, we join the Seventh Circuit and hold that district courts, federal magistrates, and state judges may authorize television surveillance of private premises in appropriate circumstances. The only questions remaining then are: (1) In what circumstances and by what standards should visual electronic surveillance be permitted?; and (2) Does this case present such circumstances? The answers to these questions involve the traditional balancing of the interests of personal privacy and the interests of law enforcement, which is the function of fourth amendment jurisprudence.

In *Berger* and *Katz,* both of which antedated the passage of Title III, the Supreme Court set forth the minimum constitutional standards governing the use of aural electronic surveillance. First, a warrant authorizing such surveillance may issue only upon probable cause, supported by oath or affirmation, that a particular person is committing, has committed, or is about to commit a crime. Second, the Constitution requires particularization in the warrant, i.e., the warrant must describe the place to be searched; the person or thing to be seized; the crime that has been, is being, or is about to be committed; and the information sought. Third, concern with the indiscriminate nature of electronic surveillance led the *Berger* Court to require that a warrant authorizing electronic surveillance be sufficiently precise so as to minimize the recording of activities not related to the crimes under investigation. Finally, before a court may issue a warrant authorizing electronic surveillance, it must certify that there is no less intrusive means for

obtaining the needed evidence. Given the obvious similarities between aural and video electronic surveillance, we believe that the same constitutional standards governing the former should be applied in determining whether or not to authorize the latter.

In addition, when Congress passed Title III, it obviously considered the competing policies of protecting personal privacy and ensuring effective law enforcement, and there is abundant evidence that it specifically intended to adopt the constitutional guidelines announced in *Berger* and *Katz*. S. Rep. No. 1097, 90th Cong. & Ad. News 2112, 2153-63. Thus, we deem it wise, if not necessary, to look to the more precise standards Congress adopted in Title III for audio surveillance in promulgating guidelines for court-ordered authorization of video surveillance. *See Order Authorizing Interception,* 513 F. Supp. at 422-23.

In similar fashion, the *Torres* court borrowed four provisions of Title III implementing the Fourth Amendment's requirements of particularly and minimization as a "measure of the government's constitutional obligation of particular description in using television surveillance to investigate crime." 751 F.2d at 885. These four provisions are: (1) the judge issuing the warrant must find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," 18 U.S.C. § 2518(3)(c); (2) the warrant must contain "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates," *id.* § 2518(4)(c); (3) the warrant must not allow the period of interception to be "longer than is necessary to achieve the objective of the authorization, [ ] or in ant event longer than thirty days" (though extensions are possible), *id.* § 2518(5); and (4) the warrant must require that the interception "be conducted in such a way as to minimize the interception of communications

not otherwise subject to interception under [Title III]," *id.*

We likewise believe that these standards, borrowed from Title III, together with the more general constitutional requirements, form a sufficient outline of the showing the government must make before a warrant should issue authorizing video surveillance. Applications for video surveillance should not be strictly judged by all of the other procedures and requisites of Title III, however, because, like the Seventh Circuit, we borrow the statutory standards quoted above as a measure of the government's constitutional obligation.

A review of the government's application for the November 30, 1982 warrant demonstrates that all of the constitutional requirements set out above were met. The application contained the following: (1) written authorization from the Department of Justice; (2) a particular description of the location, people, and offenses to be surveilled; (3) a statement regarding the necessity for such surveillance; (4) minimization procedures so that only authorized activity would be surveilled; and (5) provision for periodic reports on the progress of the surveillance. In addition, the affidavits submitted by an Assistant United States Attorney and an FBI Special Agent sufficiently detailed the basis for probable cause to believe that criminal activities were being conducted in the Resource Capital offices and explaining why other means of investigation were inadequate. Finally, the warrant was issued for only thirty days (although later extended for an additional thirty days) and contained all the requisite findings and protections.

Appellants, citing our decision in *United States v. Lilla*, 699 F.2d 99 (2d Cir. 1983), contend that the government failed in this case to demonstrate that video

surveillance was necessary.[8] In *Lilla*, we held that the government had failed to establish that other investigative procedures were either unlikely to succeed or too dangerout to use. The Title III affidavit in *Lilla* did not reveal what, if any, investigative techniques were attempted prior to the wiretrap request. Instead, it merely asserted that "no other investigative method exists to determine the identity" of individuals who might have been involved in the narcotics transaction. Accordingly, we concluded that the government had failed to meet the requirements of Title III.

Here, in contrast, the affidavit of FBI Special Agent Nye, which was submitted in support of the request for video surveillance, specified that: (1) some confidential sources who had reported on the activities of the subjects of the investigation had refused to testify; (2) the undercover agent had not been permitted to be present during the passing of money and checks between one of victims and Hyman; (3) the agent had not been allowed to be present at all meetings at Resource Capital; (4) interviews with victims at the time were not feasible because of the risk that such interviews would alert the individuals associated with Resource Capital to the investigation; (5) search warrants and further investigative grand juries would be considered in the future but were not expected to produce significant evidence at the time; and (6) prior victims would be unlikely to testify for fear

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[8] Gerlitz also claims that the order was insufficiently particular because it did not identify "the precise location within the offices of Resource" Capital where the camera would be placed. The order specified that the camera would be placed "within the premises known as Resource Capital Group, Limited, Suite Number W-85, 2001 Marcus Avenue, Lake Success, New York . . . ." This warrant, which specified the suite number, sufficiently particularized the premises to be surveilled. Further particularization would have served no useful purpose, especially since the camera was placed in business premises, where expectations of privacy are much lower than in a private residence.

of reprisals by individuals associated with Resource Capital, and interviews with those prior victims would alert individuals associated with Resource Capital to the investigation.

We previously have stated that a reviewing court must consider affidavits submitted in support of wiretap applications in a "'common sense and realistic fashion'" and with "the deference properly accorded to the issuing judge." *United States v. Ruggiero*, 726 F.2d 913, 924 (2d Cir.) (quoting *United States v. Ivic*, 700 F.2d 51, 57 (2d Cir. 1983), and citing *United States v. Perry*, 643 F.2d 38, 50 (2d Cir.), *cert. denied*, 454 U.S. 835 (1981)), *cert. denied*, 105 S. Ct. 118 (1984). The undeniable reality here is that threats, fear, and violence were the mainstays of Resource Capital's daily operating procedures. Like much of organized crime, it operated behind an enforced wall of secrecy. Recognizing the nature of such organizations, Congress and the courts both have accepted that extraordinary investigative techniques are needed to successfully wage the battle against organized crime. *See, e.g.*, S. Rep. No. 1097, 90th Cong. 2d Sess. ——, *reprinted in*, 1968 U.S. Code Cong. & Ad. News 2112, 2157 ("major purpose of title III is to combat organized crime"). Here, Agent Nye's affidavit enumerated adequate facts to support his conclusion that video surveillance was necessary. On this record, we conclude that Judge Platt's warrant authorizing video surveillance of the Resource Capital offices met all the constitutional standards set out above.

B. Mens Rea *Element of RICO*

In his instructions to the jury, Judge Sand explained that the defendants could be found guilty of participating in, or aiding or abetting, the collection of an unlawful debt only if the jury found that they had acted "knowingly, wilfully and unlawfully." Judge Sand further

explained that the government could meet this burden *either* by proving specific knowledge of the interest rates on the usurious loans, *or* by showing the defendants' awareness "of the generally unlawful nature of the particular loan in question and also that it was the practice of the lenders to make such loans."

Biasucci, Gerlitz, and Capo, who were convicted for aiding and abetting the collection of an unlawful debt, contend that these instructions were erroneous. In particular, they claim that the government was required to establish that they had knowledge of the specific rates of interest being charged on the usurious loans. We do not agree that RICO requires proof of such specific knowledge, and we therefore find no error in Judge Sand's instructions.

We previously have observed that RICO imposes no additional *mens rea* requirement beyond that found in the predicate crimes. *United States v. Scotto*, 641 F.2d 47, 55 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. Boylan*, 620 F.2d 359, 361-62 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980). Consequently, we look to the *scienter* elements found in the statutory definitions of the predicate crimes to determine the degree of knowledge that must be proved to establish a RICO violation.

Section 1961(6) defines an "unlawful debt" as "a debt (A) . . . which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of . . . lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." No federal usury law applies in this case; instead, since the usurious loans charged in the indictment took place in New York, we look to New York usury law, which provides: "A person is guilty of criminal usury . . . when, not being authorized or per-

mitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan . . . at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period." N.Y. Penal Law § 190.40 (McKinney Supp. 1986). Section 190.40 does not require a specific intent to violate the usury laws. *Hammond v. Marrano,* 88 A.D.2d 758, 759, 451 N.Y.S.2d 484, 485 (4th Dep't 1982).

Likewise, the policies underlying RICO and the New York usury laws impel us not to require knowledge of the specific interest rates charged on usurious loans. RICO was enacted to "seek the eradication of organized crime in the United States by strengthening the legal tools . . . to deal with the unlawful activities of those engaged in crime." Statement of Findings, Organized Crime Control Act of 1970, 84 Stat. 923. The elimination of loansharking was one of Congress' principal aims in enacting the statute. S. Rep. No. 617, 90th Cong., 2d Sess. 78-80; H.R. Rep. No. 1574, 90th Cong., 2d Sess. 5. Given those goals, Congress could not have intended to hobble the government's ability to combat loansharking by requiring it to prove knowledge of the specific interest rates charged. As we previously have recognized, Congress expressly commanded that the RICO statute "be liberally construed to effectuate its remedial purposes." *Ruggiero,* 726 F.2d at 919 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified at 18 U.S.C. § 1961, note)). Similarly, the New York State Legislature, in adopting section 190.40, sought "to tighten the laws against 'loansharking' and to provide law enforcement with an effective weapon against 'organized or systematic loansharking.'" *People v. Ayers,* 109 Misc. 2d 870, 872, 440 N.Y.S.2d 1019, 1021 (Nassau County Ct. 1981) (quoting Governor's Memorandum, McKinney's 1965 Session Laws of New York, p. 2101).

In sum, nothing in the language of section 1961(6), which defines the elements of unlawful debt collection, the applicable New York usury laws, or the policies underlying RICO suggests the government must prove that a defendant had knowledge of the specific rates being charged on usurious loans. By its terms, all that RICO requires is proof that a debt existed, that it was unenforceable under New York's usury laws, that it was incurred in connection with the business of lending money at more than twice the legal rate, that the defendant aided collection of the debt in some manner, and that the defendant acted knowingly, willfully and unlawfully.

As a general rule, aiders and abettors are punishable as principals. 18 U.S.C. § 2(a) (1982). We recently held that specific knowledge of a fact need not be proven to convict an aider or abettor, absent such direction in the statute itself. *United States v. Falu,* 776 F.2d 46, 49 (2d Cir. 1985); *see, e.g., United States v. Yermian,* 104 S. Ct. 2936, 2943 (1984) (knowledge of federal agency jurisdiction not required by 18 U.S.C. § 1001); *United States v. Feola,* 420 U.S. 671, 684 (1975) (knowledge that victim is a federal officer not required by 18 U.S.C. § 111); *United States v. Ardito,* Nos. 85-1271, 85-1272, slip op. at 1358 (2d Cir. Jan. 31, 1986) (knowledge that obstructed proceeding is federal in nature not required by 18 U.S.C. § 1503); *United States v. Roglieri,* 700 F.2d 883, 885 (2d Cir. 1983) (knowledge that item has been stolen from mail not required by 18 U.S.C. § 1708). Appellants have not pointed to any evidence in RICO or its legislative history indicating that specific knowledge of the interest rates charged is required. Accordingly, we see no reason to require proof of such knowledge.

C. *Prosecutorial Misconduct*

Appellants contend that certain prosecutorial misconduct deprived them of a fair trial. In particular, they argue that the use of the metaphor "iceberg" to describe the criminal enterprise intimated that the evidence adduced at trial was only the "tip" of the "iceberg" of other unproven criminal activity. Appellants also argue that the cumulative effect of various other remarks made by the prosecutor during the course of the trial was unduly prejudicial. Both contentions are without merit.

The use of the term "iceberg" was not improper. The government is not barred from using rhetorical devices during the trial. *United States v. Bagaric*, 706 F.2d 42, 60 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983). Here, the "iceberg" metaphor was used for the limited purpose of describing the structure of the loansharking operation: the "tip" of the "iceberg" being the business front, and the submerged segment, concealed from view, representing the rest of the enterprise. The use of the metaphor was not, as appellants contend, a reference to evidence of other crimes not adduced at trial. This use of the "iceberg" metaphor was entirely proper. *Cf. Hutchins v. Wainwright*, 715 F.2d 512, 515-16 (11th Cir. 1983) (government may not use iceberg metaphor to argue to the jury that the crimes proved at trial are only one part of defendant's illegal activities), *cert. denied*, 104 S. Ct. 1427 (1984); *Stimack v. Texas*, 548 F.2d 588, 588-89 (5th Cir. 1977) (per curiam) (same); *United States v. Grossman*, 400 F.2d 951, 955-56 (4th Cir.) (same), *cert. denied*, 393 U.S. 982 (1968).

The other remarks of the prosecutor objected to by appellants stand on different footing, because they clearly were inappropriate. First, in his rebuttal statement, the prosecutor improperly suggested to the jury that the government could have prolonged the trial for

three months. Second, the prosecutor repeatedly engaged in needless and unwarranted *ad hominem* attacks against defense counsel.[9]

The fundamental question in such circumstances is whether the prosecutor's misconduct caused substantial prejudice to the defendants, thereby depriving them of their rights to a fair trial. *United States v. Modica,* 663 F.2d 1173, 1181 (2d Cir. 1981), *cert. denied,* 456 U.S. 989 (1982); *United States v. Praetorius,* 622 F.2d 1054, 1060 (2d Cir. 1979), *cert. denied,* 449 U.S. 860 (1980). At the same time, criminal convictions are not to be lightly overturned on the basis of a prosecutor's inappropriate comments standing alone in an otherwise fair proceeding. *United States v. Young,* 105 S. Ct. 1038, 1044 (1985) (context in which remarks were made must be examined to determine the probable effect on the jury's ability to judge the evidence fairly); *United States v. Wilkinson,* 754 F.2d 1427, 1435 (2d Cir.), *cert. denied,* 105 S. Ct. 3482 (1985). Accordingly, we have adopted a contextual approach that considers the following factors: "the severity of the misconduct; the measures adopted to cure the misconduct; and the certainty of conviction absent the improper statements." *Modica,* 663 F.2d at 1181.

Applying these factors, we find that the prosecutor's comment about being able to prolong the trial for three months, although improper, does not mandate the extraordinary remedy of reversal. Significantly, Judge Sand had it stricken from the record and gave an immediate

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[9] For instance, the prosecutor addressed defense counsel at one point as "you sleaze," tr. at 6512, at another as "you hypocritical son—," tr. at 2730, as being "so unlearned in the law," tr. at 3152, and on several occasions the prosecutor objected to questions by the defense as "nonsense," tr. at 90, 2220, 4527, 4528.

curative instruction.[10] In any event, as set out more fully below, we are convinced that appellants would have been convicted even absent this improper statement.

Similarly, although the prosecutor's disparaging remarks about defense counsel certainly were improper and have no place in any court, they were inconsequential, isolated aberrations in a lengthy trial. These remarks do not appear to have been made in bad faith. Indeed, the prosecutor conceded their impropriety when chastised by the district court. They were instead imprudent and infrequent "outbursts." In this light, we cannot say that the trial rose to the level of a proceeding marked by passion and prejudice. *Cf. Bagaric,* 706 F.2d at 58-59; *Modica,* 663 F.2d at 1181. More important, Judge Sand

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[10] Immediately after the prosecutor made this remark, Judge Sand interjected: "Ladies and gentlemen, you are to decide this case on the evidence which has been presented and the reasonable inferences that can be drawn from the evidence that has been presented. That is the basis upon which you are to decide this case. That is the only basis upon which you are to decide this case." Tr. at 9540.

After defense counsel questioned whether this instruction was sufficient, Judge Sand further instructed the jury to understand the government's comment only as its "contention that it sustained its burden of proof," and "not to construe the government's remarks . . . as any suggestion that there were witnesses or evidence available to the government as to matters not already before you."

The final instructions to the jury also reflected this correction:

> In its rebuttal summation, the government asserted that it could have prolonged the trial for three months. This remark is stricken. You are not to construe the government's remark, however, even though it is stricken, as any suggestion that there are witnesses or evidence available to the government as to matters not already before you.

Tr. at 9632-33.

gave appropriate curative instructions, thereby mitigating any possible prejudice.[11]

Finally, absent the prosecutor's improper remarks, the eight appellants certainly would have been convicted. There was ample evidence of their wrongdoing, including the testimony of several victims of the loansharks and the tape recordings of conversations at the

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[11] Judge Sand on several occasions admonished the prosecutor for the use of "nonsense" in his objections. Tr. at 90, 2220, 4528. The remark concerning defense counsel being unlearned in the law was stricken from the record. Tr. at 3152. After one particularly inflammatory remark, Judge Sand instructed the jury as follows:

> Ladies and gentlemen of the jury, I am told that just prior to the recess a remark was made by the Government attorney which I did not hear and which you may have heard, which is unfortunate. I ask if you did hear it that you disregard it because it was improper.
>
> Let me say something which you are already experts at, and that is the recognition of the fact that in a case of this length and of this nature emotions sometimes run high. Sometimes attorneys are carried away by the zeal of the representation of the interests of their client, be it the Government or the defendants. Sometimes they say things which in calm hindsight and reflection they may know were improper. That's because they are human beings and we have no substitute for human beings.
>
> It is important, however, for you, as jurors, to keep your eye on the ball, and the ball is what are the facts? Who is telling the truth? [A]nd other matters which I will explain in some detail in my charge. . . .
>
> * * *
>
> So I ask you to put out of your minds entirely the incident which just occurred prior to the recess. If you happened to hear it or any other exchanges that have taken place during the course of the trial in which I have had occasion to admonish counsel or indicate to counsel the manner in which they were proceeding was improper.

Resource Capital offices. Seven of the fifteen defendants were acquitted of all charges and the eight appellants were convicted of only some of the charges against them. *See supra* notes 1-2. This demonstrates the meticulous care the jury exercised in weighing the evidence and reaching its verdict and therefore reinforces our conclusion that the prosecutor's remarks did not undermine the jury's ability to view the evidence fairly and free from passion and prejudice.[12]

In sum, although the prosecutor's statements clearly were improper in several instances, they did not result in substantial prejudice to the appellants so as to deprive them of a fair trial.

D. *Double Jeopardy*

Hyman and Cooper each were convicted on Count One of the Indictment for violation of 18 U.S.C. § 1962(c) and on Counts Two through Five for violation of 18 U.S.C. § 1962(b). Each was sentenced to twenty years' imprisonment on Count One and to a total of ten years' imprisonment on Counts Two through Five, consecutive to the sentence imposed on Count One. Hyman and Cooper argue that, because these convictions arise from

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[12] In reaching this conclusion, we do not condone or approve the prosecutor's unprofessional comments. Nevertheless, as we have stated before, "[r]eversal is an ill-suited remedy for prosecutorial misconduct . . . [where] an individual . . . was fairly convicted." *Modica*, 663 F.2d at 1184. In the instant case, we do not believe the prosecutor's comments, in context, even border on requiring reversal. Sanctions for such misconduct preferably are left to the trial judge, since he "is in an especially well-suited position" to assess the severity of the misconduct and the need for and level of a response. Here, Judge Sand seemed fully aware of the range of remedies available to him, and he did a commendable job of controlling the overall tenor of the trial. Accordingly, we see no reason to address the prosecutor's misconduct further in this opinion.

the same acts or transactions, the cumulative punishment imposed by the district court violates the double jeopardy clause. We disagree.

It has long been settled that "a single transaction may give rise to liability for distinct offenses under separate statutes without violating the Double Jeopardy Clause." *United States v. Barton,* 647 F.2d 224, 235 (2d Cir.), *cert. denied,* 454 U.S. 857 (1981). As the Supreme Court has directed:

> The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger v. United States,* 284 U.S. 299, 304 (1932):
>
> > "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . ."

Brown v. Ohio, 432 U.S. 161, 166 (1977); *United States v. Langella,* 776 F.2d 1078, 1081-82 (2d Cir. 1985).

In applying the *Blockburger* test, we are required to focus on the statutory elements of each offense. *Langella,* 776 F.2d at 1082 (citing *Albernaz v. United States,* 450 U.S. 333, 338 (1981)). If each *statute* requires proof of a fact that the other does not, the *Blockburger* test is satisfied, even if the same proof is used at trial to establish both crimes. *Id.*

In the instant case, sections 1962(c) and 1962(b) are sufficiently distinguishable to permit the imposition of cumulative punishment. Section 1962(c) requires the government to prove that a defendant "conduct[ed] or

participate[d], directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Significantly, section 1962(c) does not require proof that a defendant acquired or maintained any interest in a victim's business. By contrast, section 1962(b) requires the government to demonstrate that a defendant "through a pattern of racketeering activity or through collection of an unlawful debt . . . acquire[d] or maintain[ed], directly or indirectly, any interest in or control of any enterprise." The distinction is clear—section 1962(b) proscribes the acquisition or maintenance of a victim's enterprise, while 1962(c) prohibits the conduct of the criminal enterprise.[13]

The statutory offenses involved here each require proof of an element that the other does not, and, therefore, support the imposition of consecutive sentences for these violations. *Cf. Bagaric,* 706 F.2d at 63-64 n.18 ("the plain language and different elements of § 1962(c) and § 1962(d) . . . , combined with the absence of evidence of a contrary legislative intention, support the imposition of consecutive sentences for violations of both subsections").

III. CONCLUSION

We have considered all of appellants' arguments and find that none of them requires reversal. Accordingly, the judgments of conviction are affirmed.

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[13] The legislative history of these two subsections reinforce our conclusion. The House Report provides: "Subsection (b) prohibits *acquisition or maintenance of an enterprise* through the proscribed pattern of racketeering activity or collection of unlawful debt," while "Subsection (c) prohibits *the conduct of the enterprise* through the prohibited pattern of activity or collection of debt." H.R. Rep. No. 1549, 91st Cong. 2d Sess. ____, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4007, 4033 (emphasis added).

Appendix B
Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of April, one thousand nine hundred and eighty-six.

FILED: April 28, 1986

Nos. 85-1206, 85-1207, 85-1208, 85-1209, 85-1210, 85-1211, 85-1212, 85-1224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

JOSEPH BIASUCCI, JESSE DAVID HYMAN, a/k/a "DOC", STANLEY GRAMOVOT, ALAN ALBENGA, MELVIN COOPER, ANTHONY CHARLES CAPO, JR., OSCAR LOUIS ALBENGA, a/k/a "AL" and CHAIM GERLITZ,
Defendants-Appellants.

Petitions for rehearing containing a suggestion that the actions be reheard in banc having been filed herein by counsels for the defendants-appellants, Anthony Charles Capo, Jr., Joseph Biasucci and Melvin Cooper,

Upon consideration by the panel that heard the appeals, it is

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for
Rehearing In Banc

Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____
Elaine B. Goldsmith,
Clerk